No. 87

IN THE

Supreme Court of the United States

October Term, 1946

V. M. ANDERSON, Receiver of National Bank of Kentucky, Louisville, Kentucky,

Petitioner,

vs.

IRVIN YUNGKAU, Executor of the Estate of Albert Yungkau, Deceased, et al.,

Respondents.

BRIEF FOR RESPONDENT HENRY G. SANDIFER

WILLIAM J. PRICE,
HENRY G. SANDIFER,
R. T. DICKERSON,
GEORGE W. LUEDEKE,
Attorneys for Respondent, Henry G. Sandifer, Executor of Estate of Alexander B. Massey, Deceased.

CHASE-LINDEN PRESS, INC. — LAW PRINTERS — CINCINNATI 2, OHIO

SUBJECT INDEX

	Page
Opinions Below	1
Statement of the Case	2
Argument	2
Conclusion	11

TABLE OF CASES

Adams v. Woods, 6 U. S. 2 Cranch 336	7
Anderson v. Yungkau, et al, 153 Fed. (2d) 685	2
Beatty v. Burnes, 12 U. S. 8, Cranch 98	7
Campbell v. Hooverhill, 155 U. S. 609	7
Counaway, Rec'r. of Moscow National Bank, 178 U. S. 421	5
Green v. Watkins, 6 Wheaton 260	5
The Harrisburg, 119 U. S. 199	5
Joint Council Dining Car Employees Local v. Delaware Lackawanna and Western R. Co. 9 Federal Rules Service 6 A. 33 Case 2	6
Case 1	6
The Northwestern, 26 Fed. (2d) 290	6
Texas and N. O. R. Co. vs Miller 221 U. S. 408	6
Telegraphers v. Railway Express Co. 321 U. S. 342	7
United States v. Sherwood 312 U. S. 584	7
Wallace v. United States, 142 (2d) 240 (C. C. A. 2)	11
Winkelman v. General Motors Corp., 30 F. Supp. 112 (S. D. N. Y.)	11

STATUTES, RULES AND MISCELLANEOUS

Advisory Committee's Notes to Rule 25	4
Reports of Advisory Committee on changes in Rules: Second Draft May 1945 — page 6, note to Rule 6	8

Page

Third Draft and Note thereto — Under Rule 6 page 5 8
Note to Draft May 1st 1936 and April 1, 1937 4
Third Draft — note under Rule 25 at page 32 9

Rules of Civil Procedure for the District Courts of the United States, Rules 6 (b) and 25 (a) .. 2

Statute — Section 778 of Title 28 of U. S. Code (Judicial Code) 2
Historical Note to said Statute 4

Statute — Act Authorizing Rules, Act June 19th, 1934, C. 651; Secs. 1, 2 (48 Stat. 1064) U. S. C. Title 28 Sec. 723 (b), 723 (c) 3

IN THE

Supreme Court of the United States

October Term, 1946

No. 87.

A. M. ANDERSON, Receiver of National Bank of Kentucky, Louisville, Kentucky,

Petitioner,

vs.

IRVIN YUNGKAU, Executor of the Estate of Albert Yungkau, deceased; H. E. FRANTZ, Executor of the Estate of William R. Gilpin, deceased; LUCY LOGAN MASSIE, Executrix of the Estate of William K. Massie, deceased; BEN WILLIAMSON, JR., and DAVIS GEIGER, Co-Executors of the Estate of Ben Williamson, deceased; WATT M. PRICHARD and CHARLES V. KITCHEN, Co-Executors of the Estate of James H. Kitchen, deceased; CATHERINE C. KITCHEN, Executrix of the Estate of John W. Kitchen, deceased; HENRY SANDIFER, Executor of the Estate of Alexander B. Massey, deceased,

Respondents.

BRIEF FOR RESPONDENT HENRY G. SANDIFER.

OPINIONS BELOW

The references to the opinions below are correctly given in the brief of the petitioner.

STATEMENT OF THE CASE

The statement of the case as set forth in the brief of the petitioner is accepted subject to the comment that the question involved is not so much as to whether Rule 6 (b) means what it says as that the specific Rule 25 (a) means exactly what it says; that the effect of the holding of the courts below was to hold the application of Rule 6 (b) within the bounds permissible under the limitations of Section 723 (b) and (c) and Section 778 of Title 28 of the United States Code.

ARGUMENT

It was the holding of the lower courts, and our contention, that the fact that the petitioner had a great number of cases, and did not learn of the deaths of the decedents, whose estates are represented by the respondents, for more than two years after the deaths of the decedents is not material.

> "In our judgment", said the Circuit Court of Appeals in this action, "Rule 25 (a) (1) has the same effect as a statute of limitation with respect to the revival of an action against the estate of a decedent. * *
> "'Excusable neglect' to revive an action within a period of definite lawful limitation is no more effective in avoidance of the bar than is the failure to bring an original action within the time limit fixed by statute. The Court is without jurisdiction to excuse 'excusable neglect' in either instance".

It is our position that Rule 25 (a) is merely a reaffirmance of Section 778 of the Judicial Code, which provided a

definite statutory limitation. The reviving of an action is essentially the same as the bringing of a new action.

> "Prior to the adoption of Rule 25 (a) (1), the period of limitation for reviving an action against the estate of a defendant was fixed by Section 778 of the Judicial Code at two years after his death. No purpose is manifested", continued the Circuit Court of Appeals herein, "to change the limitation period in the adoption of the civil procedure rule in question. On the contrary, the same limitation is written into the rule. If, within two years after death, substitution of the proper parties has not been made, the rule commands the court to dismiss the action against the deceased party."

It is our further position that the right of revival in this case accrues solely by virtue of the authorization given by Section 778 of the Judicial Code; that same became a substantive right by force of said statute and the period of limitation within which said right must be exercised became a part of said substantive right.

Furthermore, the Rules of Civil Procedure in force at all times covered by the occurrences and incidents in this case and now in force, were limited and bound by the following restriction in the Act authorizing said Rules, namely, Act of June 19, 1934, c. 651, Secs. 1, 2 (48 Stat. 1064), U.S.C. Title 28 Secs. 723 (b), 723 (c):

> "Said rules shall neither abridge, enlarge nor modify the substantive rights of any litigant."

Certainly, any enlargement by Rule 6 (b) or Rule 25 of the period of two years within which we claim this case must have been revived would be the modification

and abridgment of the substantive rights of respondents.

The historical note in the U. S. Code, Annotated, under Section 778 states:

> "The first paragraph of this section constitutes R. S. Sec. 955, which was derived from Act Sept. 24, 1879 c. 20 Sec. 31, 1 Stat. 90. Act Nov. 23, 1921, c. 142, Sec. 1, cited to the text added thereto the second and third paragraphs."

The Advisory Committee's notes to the present Rule 25, now in force, (Preliminary Draft of Rules of Civil Procedure, etc. dated May 1, 1936, and Draft of April, 1937) said:

> "The first paragraph of this rule is based on Equity Rule 45 (Death of Party-Revivor) and U.S.C. Title 28 S. 778 (Death of parties; substitution of executor or administrator)."

The phraseology of Section 778 is worthy of note:

> "The provisions of this section shall extend to and over executors and administrators of any party, who dies before final judgment or decree appointed under the laws of any State or Territory of the United States and such courts *shall have jurisdiction within two years* from the date of the death of the party to the suit to issue its scire facias to executors and administrators * * *" (Underscoring ours.)

Based upon and following said section, Rule 25 (a) does not attempt to change this meaning or this limitation statute, but pertinently provides:

> "If a party dies and the claim is not thereby extinguished, the Court within two years after

the death may order substitution of the proper parties."

This Rule recognizes revivorship action only within two years after the death of the party, as the Judicial Code limits it by Section 778. Thereafter the Court, as provided by the Code and recognized by the Rule, has no jurisdiction against the executor or administrator. The court has lost jurisdiction of the cause as to the deceased party and his personal representatives and the Rule then succintly provides:

> "If substitution is not so made, the action shall be dismissed as to the deceased party."

As said by the Circuit Court of Appeals, "The language of the rule is clearly imperative."

This Court said in *Green* v. *Watkins* 6 Wheaton 260, cited in re Connaway, Receiver of Moscow National Bank, 178 U. S. 421, 435:

> "In the former case (that of death of parties before judgment) all personal actions at common law abate and it required the aid of some statute like that of the 31st Section of the Judiciary Act of 1789 c. 20 to enable the action to be prosecuted by or against the personal representative of the deceased when the cause of action survived."

This Court said further in The Harrisburg, 119 U. S. 199, 214:

> "The liability and the remedy are created by the same statutes and the limitations of the remedy are, therefore, to be treated as limitations of the right."

> "The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all."

Citing this case and *Texas and N.O.R. Co.* v. *Miller*, 221 U. S. 408, the Federal Court in The Northwestern, 26 F. (2) 290, 291 held:

> "It (a limit of time for bringing suit contained in a statute) is a limitation upon the right created by the statute, and, if suit is not brought within the time limited, the right, not merely the remedy, is lost."

The Circuit Court of Appeals of the 2nd Circuit on July 15, 1946, in the case of *Joint Council, Dining Car Employees Local* v. *Delaware Lackawanna and Western R. Co.*, 9 Federal Rules Service 6 a. 33 Case 2 reversed the District Court on other grounds, but said:

> "* * * We may express agreement with the conclusion raised as to the first point."

That conclusion was expressed by the District Court, Southern District of New York, on September 14, 1945, 9 Federal Rules Service 6 a. 33 Case 1, as follows:

> "A cause of action which accrues by force of a statute derives its substantive force from the statute and the period of limitation provided therein becomes a part of the substantive right and when the period has terminated the right is lost. The Northwestern 26 F. (2) 290, 291; *Central Vermont R. Co.* v. *White* 238 U. S. 507, 511. To permit the extension of the statutory period for an additional day would be to

enlarge the express limitation of the statute. This court is without power to enlarge a substantive right."

This court in 1941 in *U. S.* v. *Sherwood*, 312 U. S. 584, 589, said:

> "An authority conferred upon a court to make rules of civil procedure for the exercise of its jurisdiction is not an authority to enlarge that jurisdiction; and the Act of June 19, 1934, 48 Stat. 1064, 28 U. S. C. 723 (b) authorizing this Court to prescribe rules of procedure in civil actions gave it no authority to modify, abridge or enlarge the substantive rights of litigants or to enlarge or diminish the jurisdiction of federal courts."

Not only does the language of limitation in Sec. 778 and Rule 25 carry emphasis from its expressiveness and definitiveness, but the position of this Court from *Beatty* v. *Burnes* 12 U. S. 8 Cranch 98, wherein Justice Story observed with approval, "Now the statute of limitations has been emphatically declared a statute of repose", following equal approval by Chief Justice Marshall in *Adams* v. *Woods* 6 U. S. 2 Cranch 336, 342, through like approval in the recent case of *Telegraphers* v. *Railway Express Co.* 321 U. S. 342, has been to regard statutes of limitation with favor as "designed to promote justice"; as expressed in the last named case. In *Campbell* v. *Haverhill*, 155 U. S. 609 this Court said:

> "Whatever prejudice there may have been in ancient times against statutes of limitations, it is a cardinal principle of modern law and of this court that they are to be treated as statutes of repose, and are not to be construed so as to de-

feat their obvious intent to secure the prompt enforcement of claims during the lives of the witnesses, and when their recollection may be presumed to be still unimpaired."

We submit that the singling out of executors and administrators in Section 778 of the Judicial Code for special limitation of the jurisdiction of the Federal Courts with reference to them within a period of two years in the revival of a cause of action is significant of itself and indicative of the intention to give them repose after that period.

Moreover, the Advisory Committee on the Rules in their 2nd Draft of Proposed Amendments to the present Rules filed in May 1945 at page 6 in notes under Rule 6, took occasion to express the following opinion:

> "As to Rule 25 in substitution, while finality is not involved, the limit there fixed should be *absolute, as it always has been by statute.*" (Underscoring ours.)

The Committee in their 3rd Draft filed in June, 1946, in their notes to Rule 6 at page 5 says:

> "As to Rule 25 on substitution, while finality is not involved, *the limit there fixed should be controlling.* That rule, *as amended*, gives the court power upon showing of a reasonable excuse, to permit substitution after the expiration of the two year period." (Underscoring ours.)

This Committee, therefore, admits the necessity for the limitation period of two years being kept as a fixed one, that executors and administrators are entitled to have it so for repose, and that only by amendment could

even Rule 25 be held to recognize a limitation other than the two year period. Their note under Rule 25 at page 32 of their report is as follows:

> "*Note.* This amendment guards against possible injustice in a case where there is some reasonable excuse for not applying for substitution within the 2-year period. It has been held that the court has no power to permit substitution after the expiration of the 2-year limit, irrespective of the circumstances. *Winkelman* v. *General Motors Corp.* (S. D. N. Y. 1939) 30 F. Supp. 112; *Anderson* v. *Brady* (E. D. Ky. 1941) 4 Fed. Rules Serv. 25a.1, Case 1; *Photometric Products Corp.* v. *Radtke* (S. D. N. Y. 1946) 9 Fed. Rules Serv. 25a.3, Case 1; *Anderson* v. *Yungkau* (C. C. A. 6th, 1946) 153 F. (2d) 685, cert. granted (1946) 66 S. Ct. 1025."

Counsel for petitioner have cited authorities to the effect that the word "shall" sometimes may be considered "may". In the Rule, however, it is submitted that the word "shall" was used advisedly in harmony with the lost jurisdiction under Section 778 of Title 28 of the U. S. Code.

It is argued on behalf of the petitioner that if the proposed amendments to the Rules to allow the courts to exercise discretion as to the revival of actions should later be adopted and the judgment of the Court of Appeals herein should be affirmed the petitioner will be deprived of "the right to obtain substitution under the circumstances in which substitution will not in the future be denied to other litigants". While failing to take into account the legislative and substantive nature of Section 778 of the Judicial Code and the basic restric-

tions against the abridgment, enlargement or modification of the substantive rights of any litigant by the Rules as provided by Sections 723 (b), 723 (c) of Title 28 of the U. S. Code, the petitioner is asking the Court to decide this case not on the law as it now is, but on new law possibly to be adopted in the future. It is not believed that protection against fraud and the protection of our military forces in time of war need to give the petitioner concern. Provision by the legislative body has been made as to both.

For the reasons we have given, we urge that the executors and administrators are entitled to the repose given them by Section 778 of the Judicial Code. We hardly think this Court will decide this cause on the basis of the law as it may later possibly be refrained through proper channels and not as it exists at this time.

The Court is respectfully requested to read the comments of the Court of Appeals as to *Wallace* v. *United States*, 142 Fed. (2d) 240 and *Winkelman* v. *General Motors Corp.*, 30 F. Supp. 112 and our briefs in the Court of Appeals and in opposition to the petition for writ of certiorari.

CONCLUSION

We respectfully submit that the definite period fixed for the revival of actions against executors and administrators by Section 778 of the Judicial Code could not be and was not modified in the Rules of Civil Procedure For District Courts and that the judgment of the Circuit Court of Appeals herein should be affirmed.

WILLIAM J. PRICE,
HENRY G. SANDIFER,
R. T. DICKERSON,
GEORGE W. LUEDEKE,
Attorneys for Respondent,
HENRY G. SANDIFER,
Executor of Estate of
Alexander B. Massey, Deceased.

SUPREME COURT OF THE UNITED STATES

No. 87.—October Term, 1946.

A. M. Anderson, Receiver of National Bank of Kentucky, Louisville, Kentucky, Petitioner,

v.

Irvin Yungkau, Executor of the Estate of Albert Yungkau, Deceased; H. E. Franz, Executor of the Estate of William R. Gilpin, Deceased; Lucy Logan Massie, Executrix of the Estate of William K. Massie, Deceased, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[January 13, 1947.]

Mr. Justice Douglas delivered the opinion of the Court.

These are seven cases in which petitioner sued to recover stock assessments from shareholders of the Banco Kentucky Co. They were started in 1936 in the Eastern District of Kentucky and were stayed by agreement while the principal case upon which these depended, *Anderson* v. *Abbott*, 321 U. S. 349, wended its way through the courts. In the latter case we sustained the liability of the shareholders of Banco for the stock assessment. That was in 1944. During the time *Anderson* v. *Abbott* was being litigated, the shareholders involved in the present litigation died and respondents became executors of their estates. Through no lack of diligence,[1] petitioner failed to learn of these facts until more than two years later. Upon learning of them he promptly moved to revive the actions against the representatives of the decedents. The Dis-

[1] Petitioner brought actions against approximately 5,000 shareholders scattered throughout the United States and some in foreign countries. During the progress of the litigation some changed their residences. And it was stipulated that petitioner, with a limited staff, could not during this time keep up with the changes of residence or deaths of defendants.

trict Court, following *Anderson* v. *Brady*, 1 F. R. D. 589, denied the motions for revivor and granted motions of the executors to dismiss. The Circuit Court of Appeals affirmed by a divided vote. 153 F. 2d 685. The case is here on a petition for a writ of certiorari which we granted because the case presented an important problem in the construction of the Rules of Civil Procedure.[2]

The case involves a reconciliation of Rule 25 (a) and Rule 6 (b). So far as material here, Rule 25 (a) provides:

> "If a party dies and the claim is not thereby extinguished, the court within 2 years after the death may order substitution of the proper parties. If substitution is not so made, the action shall be dismissed as to the deceased party."

And the relevant part of Rule 6 (b) reads:

> "When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion . . . (2) upon motion permit the act to be done after the expiration of the specified period where the failure to act was the result of excusable neglect; but it may not enlarge the period for taking any action under Rule 59, except as stated in subdivision (c) thereof, or the period for taking an appeal as provided by law."

It is said that since by Rule 25 (a) substitution may be made within two years after the death of a party, substitution is, within the meaning of Rule 6 (b), an act "allowed" to be done "within a specified time" which the court may on a showing of "excusable neglect" permit to be done after the two year period. That argument is reinforced by reliance on the provision in Rule 6 (b) which grants but two exceptions to the power of enlargement of time. Since Rule 25 (a) is not included in the exceptions,

[2] Cf. *Ainsworth* v. *Gill Glass & Fixture Co.*, 104 F. 2d 83, with *Burke* v. *Canfield*, 111 F. 2d 526, and *Mutual Benefit H. & A. Ass'n* v. *Snyder*, 109 F. 2d 469.

it is argued that the time allowed by that rule may be enlarged under Rule 6 (b). And it is pointed out that the facts of the present cases establish that the failure of the receiver to act within the two year period was the result of "excusable neglect",[3] thus giving the District Court discretion to allow the substitution under Rule 6 (b).

We agree, however, with the Circuit Court of Appeals. Rule 25 (a) is based in part on 28 U. S. C. § 778, 42 Stat. 352, which limited the power of substitution to two years from the death of a party.[4] And even within that two year period substitution could not be made unless the executor or administrator was served "before final settlement and distribution of the estate". That statute, like other statutes of limitations, was a statute of repose. It was designed to keep short the time within which actions might be revived so that the closing and distribution of estates might not be interminably delayed.[5] That policy is reflected in Rule 25 (a). Even within the two year period substitution is not a matter of right; the court "may" order substitution but it is under no duty to do so. Under the Rule, as under the statute, the settlement and distribution of the estate might be so far advanced as to warrant a denial of the motion for substitution within the two year period. In contrast to the discretion of the court to order substitution within the two year period is the provision of Rule 25 (a) that if substitution is not made within that time the action "shall be dismissed" as to the deceased. The word "shall" is ordinarily "the language of command". *Escoe* v. *Zerbst*, 295 U. S. 490, 493. And when the same Rule uses both "may" and "shall", the normal inference is that each is used in its usual sense—the one act being permissive, the other mandatory. See *United States* v. *Thoman*, 156 U. S. 353, 360.

[3] See note 1, *supra*.

[4] But see *Baltimore & Ohio R. Co.* v. *Joy*, 173 U. S. 226; *Winslow* v. *Domestic Engineering Co.*, 20 F. Supp. 578.

[5] And see H. Rep. No. 429, 67th Cong., 1st Sess., p. 2.

Thus, as stated by the Circuit Court of Appeals, Rule 25 (a) operates both as a statute of limitations upon revivor and as a mandate to the court to dismiss an action not revived within the two year period. Rule 6 (b) relates to acts required or allowed to be done by parties to an action and permits the court to afford relief to a party for his failure to act within the prescribed time limits. There would be more force in petitioner's argument if Rule 25 (a) had, without more, set a two year period within which substitution might be made. But Rule 25 (a) does not stop there. It directs the court to dismiss the action if substitution has not been made within that time. That is action required of the court, not of a party. And Rule 6 (b) should not be construed to override an express direction of action to be taken by the court. See *Wallace* v. *United States*, 142 F. (2d) 240, 244.

Reasons of policy support this construction. It is, to be sure, stipulated that in five of the present cases the estate is "still open and undistributed"; in one it is 'still open"; in another it has been distributed. At least where an estate is ready to be closed or where there has already been a distribution, revivor may work unfairness and be disruptive of orderly and expeditious administration of estates. But it is not enough to say that if Rule 6 (b) and Rule 25 (a) are construed to permit substitution after the two year period, the court need not allow it where unfairness or prejudice would result. For the normal policy of a statute of limitations is to close the door—finally, not qualifiedly or conditionally. The federal law embodied in Rule 25 (a) has a direct impact on the probate of estates in the state courts. It should not be construed to be more disruptive of prompt and orderly probate administration in those courts than its language makes necessary.

Affirmed.

THE CHIEF JUSTICE and MR. JUSTICE REED took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 87.—October Term, 1946.

A. M. Anderson, Receiver of National Bank of Kentucky, Louisville, Kentucky, Petitioner.

v.

Irvin Yungkau, Executor of the Estate of Albert Yungkau, Deceased; H. E. Franz, Executor of the Estate of William R. Gilpin, Deceased; Lucy Logan Massie, Executrix of the Estate of William K. Massie, Deceased, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[January 13, 1947.]

Mr. Justice Rutledge, dissenting.

Rule 25 (a) provides:

> "If a party dies and the claim is not thereby extinguished, the court within 2 years after the death may order substitution of the proper parties. If substitution is not so made, the action shall be dismissed as to the deceased party. . . ."

I agree that the rule confers discretion to order substitution of parties, hence in appropriate circumstances to refuse to do so and thereupon to dismiss the action. But I do not think the discretion ends with the two-year period.[1] The rule is not worded to require this and ascribing such a construction to it brings it into collision with the express terms and the policy of Rule 6 (b). The difference made by expiration of the period is not to con-

[1] The Notes of the Advisory Committee on the original Federal Rules state that Rule 25 (a) "is based upon Equity Rule 45 (Death of Party—Revivor) and U. S. C., Title 28, § 778 (Death of parties; substitution of executor or administrator)." Prior to 1921 what is now 28 U. S. C. § 778 did not apply to suits in equity. Equity Rule 45, with its provision that a motion for substitution might be made within

vert the rule's command for dismissal from a discretionary to a mandatory one. It is merely to narrow the conditions under which the discretionary power shall be exercised.[2]

I find no basis for thinking that the time limitation prescribed by the first sentence of Rule 25 (a) was intended to be treated differently than any other prescribed by the Rules, except those concerning which they expressly forbid enlargement. The committee which drafted the Rules was highly competent, spent years in exacting preparation, and was thoroughly cognizant of what it intended to propose concerning time limitations. Meticulous attention was given to them. By count the index shows 134 references to provisions relating to time for taking various actions.

The committee knew their volume and variety. It was conscious also of the many difficulties and injustices which had arisen by virtue of rigid time limitations, whether laid by statute, rule of court, or judicial decision.[3] The deliberately chosen policy was to do away with those rigidities

"a reasonable time" was governing. But by 42 Stat. 352 it was provided that the revival of equity suits should be by *scire facias*, and a two-year statute of limitataions was made applicable. See 28 U. S. C. A. (1928) § 774 to End, p. 99, "Compiler's note."

However, in general the Rules were intended to supersede rather than incorporate previously existing statutory or other provisions, where the wording was different; and the committee's statement that Rule 25 (a) "is based upon Equity Rule 45" as well as 28 U. S. C. § 778, together with the different wording of the rule and that section, may indicate that the committee either considered Equity Rule 45 still effective, for which there seems to have been some judicial authority, see *Electropure Sales Corp.* v. *Knight*, 21 F. Supp. 451, 452; *Gaskins* v. *Bonfils*, 4 F. Supp. 547, 550–551, or intended to adopt it in substance as the basis and effect of Rule 25 (a). Had the purpose been to incorporate 28 U. S. C. § 778, there would have been no necessity for changing the wording, except in relation to the *scire facias* procedure. See note 10 *infra* and text.

[2] See text at note 6 *infra*.

[3] See Rules 6 (b), (c) and 60, all of which have received wide comment. See also notes 4 and 10.

and to substitute sound discretionary limitations, except as otherwise expressly directed.[4] This policy was stated clearly, fully and I think accurately in the Rules themselves by the addition of Rule 6, of which subdivision (b) is expressly applicable here.

By this unambiguous declaration it was provided that "the court for cause shown may, at any time in its discretion . . . (2) upon motion permit the act to be done after the expiration of the specified period where the failure to act was the result of excusable neglect."[5] This was applicable in any situation "when by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified period," with two and only two exceptions. These were to forbid enlarging the time for taking any action under Rule 59, except as stated in subdivision (c) thereof, and the period for taking appeal. Rule 73. The forbidden enlargements under Rule 59 involve matters concerning the granting of new trials.

---

[4] See Proceedings of the Institute on the Federal Rules of Civil Procedure at Washington, D. C., and of the Symposium at New York City (1939) 83–84; Proceedings of the Institute on the Federal Rules of Civil Procedure at Cleveland (1938) 210–211; Hearings before the Committee on the Judiciary of the House of Representatives with Regard to the Rules of Civil Procedure for the District Courts of the United States, 75th Cong., 3d Sess., 60.

[5] The rule in full is as follows:

"Rule 6 (b) ENLARGEMENT. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion permit the act to be done after the expiration of the specified period where the failure to act was the result of excusable neglect; but it may not enlarge the period for taking any action under Rule 59, except as stated in subdivision (c) thereof, or the period for taking an appeal as provided by law."

In those two respects and in them alone the time limitation was made, and was intended to be, "jurisdictional." For the rest the courts were to exercise discretion. It is to be emphasized that the limits of discretion fixed for enlarging time after the prescribed periods were narrowed by requiring that enlargement be made, if at all, only upon motion and only upon showing that the failure to act within time was due to excusable neglect.[6] Those limitations were applicable here, in my opinion, and admittedly they were satisfied.

Rule 6, including subdivisions (b) and (c), was thus a general and a carefully drawn declaration of paramount policy for the application of limitations of time. It made no distinction between rules governing actions to be taken by the parties and actions to be taken by the courts.[7] It made no exceptions other than the two expressly set forth. This Court approved the rule as drawn and Congress al-

---

[6] See note 5. If Rule 25 (a) constitutes in effect a statute of limitations, as the Court holds, it may be inquired whether even upon proper application made within the two-year period under Rule 6 (b) (1), see note 5, the Court could enlarge the time by extension, as seems clearly contemplated by the clause "or as extended by previous order."

[7] See note 5. The rules are replete with provisions for action to be taken within specified periods by the courts upon their own initiative as well as upon motion by the parties. Rule 6 (b) is itself an illustration. Certainly it cannot be said, in view of the rule's comprehensive language, that it applies only to actions to be taken by the parties and has no application to the large number of instances in which limitations of time are imposed for action to be taken by the courts. Such a construction would bring back many of the evils the Rules were designed to avoid. It would defeat perhaps as many of the literal and intended applications of Rule 6 (b) as it would preserve.

Rule 6 (c) is as follows: "The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the expiration of a term of court. The expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it."

lowed it to become law without modification. To assume or to rule that additional exceptions were intended is to assume that the committee, the Court and Congress overlooked others which should have been stated in Rule 6 (b)[8] or did not intend the declared policy of that section to be effective fully according to its terms. I am unable to accept either conclusion. If we may make an additional exception forbidding enlargement of time in cases covered by Rule 25 (a) in the face of the express provision of Rule 6 (b), there is no reason why others may not also be made, and thus the salutary policy of Rule 6 (b) be defeated.[9]

The considerations of policy said to support the decision would be grounds either for the district court's consideration in determining whether to deny enlargement in the exercise of its discretion or for amendment of Rule 6 (b) so as to exclude such cases as this.[9] They are not a basis in my opinion for changing that rule by interpretation or for opening the door to further restrictive amendments of Rule 6 (b) in this respect by that process. If this is to be done, it should be by the prescribed rule-making procedure. Indeed the Advisory Committee, in the recently proposed amendments to the rule, has recommended that Rule 25 (a) be rephrased so as to eliminate any question that the rule has the meaning ascribed to it in this opinion. And its note appended to the recommendation states that the purpose is to guard against injustices likely to

[8] The Advisory Committee in its Report of Proposed Amendments to the Rules of Civil Procedure (1946) 2–6 points out that District Courts and Circuit Courts of Appeals in some cases have refused to apply Rule 6 (b) to other Rules as well as Rule 25 (a); see, *e. g.*, *Wallace* v. *United States*, 142 F. 2d 240; *Reed* v. *South Atlantic S. S. Co.*, 6 Fed. Rules Serv. 60 b. 31, Case 1; *Mutual Benefit Health & Accident Ass'n.* v. *Snyder*, 109 F. 2d 469; cf. *Burke* v. *Canfield*, 111 F. 2d 326, though other cases have ruled the other way. See, *e. g.*, *Schram* v. *O'Connor*, 5 Fed. Rules Serv. 6 b. 31, Case 1, Case 2; *Ainsworth* v. *Gill Glass & Fixture Co.*, 104 F. 2d 83.

[9] But see note 10 and text.

result from a flat two-year limitation.[10] In my opinion the committee's action and the reasons given for it confirm, rather than disavow, the section's originally intended meaning.

This case is an illustration of the kinds of injustice the committee sought to avoid. And the considerations

---

[10] Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States (1946) 31–32.

The revision of Rule 25 (a), recommended by the committee reads as follows, the revised matter appearing in italics: "If a party dies and the claim is not thereby extinguished, the court *upon application made* within 2 years after the death *shall* order substitution of the proper parties. *If the application is made after 2 years the court may order substitution but only upon the showing of a reasonable excuse for failure to apply within that period.* If substitution is not so made, the action shall be dismissed as to the deceased party . . . ."

The committee appends the following comment: "This amendment guards against possible injustice in a case where there is some reasonable excuse for not applying for substitution within the 2-year period. It has been held that the court has no power to permit substitution after the expiration of the 2-year limit, irrespective of the circumstances. *Winkelman* v. *General Motors Corp.* (S. D. N. Y. 1939) 30 F. Supp. 112; *Anderson* v. *Brady* (E. D. Ky. 1941) 4 Fed. Rules Serv. 25a.1, Case 1; *Photomatic Products Corp.* v. *Radtke* (S. D. N. Y. 1946) 9 Fed. Rules Serv. 25a.3, Case 1; *Anderson* v. *Yungkau* (C. C. A. 6th, 1946) 153 F. (2d) 685, cert. granted (1946) 66 S. Ct. 1025."

In its comment relating to Rule 6 (b), pp. 2–3, the committee states: "In a number of cases the effect of Rule 6 (b) on the time limitations of these rules has been considered. Certainly the rule is susceptible of the interpretation that the court is given the power in its discretion to relieve a party from failure to act within the times specified in any of these other rules, with only the exceptions stated in Rule 6 (b), and in some cases the rule has been so construed."

"With regard to Rule 25 (a) for substitution, it was held in *Anderson* v. *Brady* (E. D. Ky. 1941) 4 Fed. Rules Serv. 25a.1, Case 1, and in *Anderson* v. *Yungkau* (C. C. A. 6th, 1946) 153 F. (2d) 685, cert. granted (1946) 66 S. Ct. 1025, that under Rule 6 (b) the court had no authority to allow substitution of parties after the expiration of the limit fixed in Rule 25 (a)."

of policy are not altogether one-sided. The effect of the decision in such a case as this is not only to throw an admittedly impossible burden upon the party seeking without neglect to enforce his cause of action. It is also to throw upon other parties, equally helpless, a heavier burden of financial loss, whether by depriving them of rightful recovery or by forcing them, in some instances at least, to bear a larger share of the common responsibility.[11]

---

[11] The statutory liability of shareholders in national banking associations was created by 12 U. S. C. §§ 63, 64. By § 63 the shareholder was made "individually responsible, *equally and ratably and not one for another*, for all contracts, debts, and engagements of such associations, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares." (Emphasis added.) By § 64 the shareholder was made "individually responsible for all contracts, debts, and engagements of such association, each to the amount of his stock therein, at the par value thereof in addition to the amount invested in such stock."

To what extent § 64 may have modified § 63 has been disputed. See *American T. Co.* v. *Gray*, 80 F. 2d 155; *First Nat. Bank* v. *First Nat. Bank*, 14 F. 2d 129. But in *Anderson* v. *Abbott* we said: "It is sufficient at this time to state that the liability of the shareholders of Banco would be measured by the number of shares of stock of the Bank, whether several or only fractional, represented by each share of stock of Banco; and that the assessment liability of each share of stock of Banco would be a like proportion of the assessment liability of the shares of the Bank represented by the former." 321 U. S. 349, 368–369. And in *Frank* v. *Geisy*, 117 F. 2d 122, 125, it was held that the omission in § 64 of the pro rata limitation of § 63 was intended to strengthen the position of creditors, making each shareholder's liability several and fully enforceable though others go free. In *First Nat. Bank* v. *First Nat. Bank*, *supra*, the shareholder made to pay was held entitled to enforce contribution against others not proceeded against. The shareholder's liability is secondary only, *McClaine* v. *Rankin*, 197 U. S. 154, 161; *First National Bank* v. *Nichols*, 294 Mass. 173, 181; and though one is not relieved either wholly or in part because others are not compelled to pay, neither is any required to pay more proportionately than is needed from the fund actually collected to discharge the bank's obligations. *Bank of Ware Shoals* v. *Martin*, 47 F. Supp. 61, 63. The liability is not a debt but is one

In my opinion the judgment should be reversed and the cause remanded to the District Court for the exercise of the discretion given by the Rules.

MR. JUSTICE BURTON joins in this dissent.

---

merely assuring payment of the bank's obligations. *McClaine* v. *Rankin, supra.*

The Court's decision therefore in effect cuts off any possibility shareholders forced to pay may have for reduction of the amounts of their payments either through the receiver's enforcement of the liability directly against decedent shareholders' estates or by seeking contribution from them after the two-year period. And this is done regardless of the estate's comparative ability to pay, of whether it is in an early or a late stage of administration, and of when the death occurs. Thus, in these cases, only one estate has been closed and one other is nearing that stage; but so far as appears the other five remain open and undistributed.

The suits were begun in 1936. Eight years were taken up for litigation of the principal issue of liability in *Anderson* v. *Abbott, supra.* That liability having been established after so long a time, now eleven years after the suits were instituted this decision comes to nullify it in substantial part and effect. The result, in my opinion, is quite as much to make the protection afforded by these statutes turn on accidents of life and death in some instances, perhaps in many, at variance with the nature of the liability and its fair administration, as other distinctions were said in the *Anderson* case to make the protection turn on irrelevant accidents. 321 U. S. at 367.